Supreme Court, U.S.
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No. 02-311

IN THE

Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

v.

SEWALL SMITH, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In this case, the United States Court of Appeals for the Fourth Circuit held that under 28 U.S.C. § 2254(d)(1), a state court application of established federal law will satisfy the "objectively reasonable" standard of review set forth in *Williams v. Taylor*, 529 U.S. 362 (2000), so long as it is "minimally consistent with the facts and circumstances of the case." The question presented is:

Does defense counsel in a capital case violate the requirements of *Strickland v. Washington* by failing to investigate available mitigation evidence that could well have convinced a jury to impose a life sentence, as this Court concluded in *Williams v. Taylor* and as most Courts of Appeals have concluded, or is defense counsel's decision not to investigate such evidence "virtually unchallengeable" so long as counsel knows rudimentary facts about the defendant's background, as the Fourth Circuit held in this case.

LIST OF PARTIES

Pursuant to Supreme Court Rule 24.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Fourth Circuit.

Kevin Wiggins was the appellee below. Thomas R. Corcoran, former warden of the Maryland Correctional Adjustment Center, and J. Joseph Curran, Jr., attorney general of the State of Maryland, were appellants below. Thomas R. Corcoran has since been replaced by Sewall Smith and, pursuant to Supreme Court Rule 35.3, has been substituted as a party.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit, reported at 288 F.3d 629 (4th Cir. 2002), is reprinted at Pet. App. 1a-26a. The decision of the United States District Court for the District of Maryland, reported at 164 F. Supp. 2d 538 (D. Md. 2001), is reprinted at Pet. App. 28a-89a. The order of the United States Court of Appeals for the Fourth Circuit, denying rehearing and rehearing *en banc*, is set forth at Pet. App. 157a-158a.

JURISDICTION

The judgment of the Court of Appeals was entered May 2, 2002. A timely petition for rehearing and rehearing *en banc* was denied May 29, 2002. The petition for a writ of certiorari was filed on August 27, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution, which provide in relevant part as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence," and "nor shall any State deprive any person of life, liberty, or property, without due process of law." This case also involves the provision of the federal habeas corpus statute governing federal review of state court decisions, 28 U.S.C. § 2254, reprinted at Pet. App. 159a-162a.

STATEMENT OF THE CASE

A. Background

On September 17, 1988, Florence Lacs, an elderly white woman, was found drowned in the bathtub of her ransacked apartment in Woodlawn, Maryland. Five days later, the police found two African Americans, Kevin Wiggins (then age 27)

and his girlfriend Geraldine Armstrong (then age 42), traveling in Ms. Lacs' car. Both were arrested and charged with murder and robbery, although the charges against Armstrong were later dropped. Wiggins had no prior criminal record.

No direct evidence established who killed Ms. Lacs. The State knew only that Wiggins was working as a painter in Ms. Lacs' apartment complex, that Wiggins and Armstrong had Ms. Lacs' car and credit cards, and that the credit cards had been used at several stores beginning on September 15.

B. The Guilt/Innocence Trial

Two Baltimore County public defenders, Carl Schlaich and Michelle Nethercott, represented Wiggins. Schlaich had previously second-chaired one capital case. Nethercott had no capital trial experience, and less than one year's experience as a defense attorney. Shortly after the appointment, Schlaich left Baltimore County to work in the Harford County defender's office. He spent one day per week on his lingering Baltimore County responsibilities. JA 475-76. Soon after this case ended, Schlaich was fired as a public defender. *Id.* 472.

Wiggins waived a jury trial and was tried before the Honorable J. William Hinkel of the Baltimore County Circuit Court in July 1989. The case against Wiggins was almost entirely circumstantial.[1] The prosecution called witnesses who placed Wiggins near (but not in) Ms. Lacs' apartment at approximately 5 p.m. on September 15, where he was painting

[1] The prosecution called two jailhouse informants – John McElroy and Christopher Turner – to testify that Wiggins confessed the murder to them. On cross-examination, McElroy acknowledged that he "made up" the central elements of his testimony, and Turner was similarly discredited. Aug. 1, 1989 Tr. at 157. During closing, the prosecution disavowed these witnesses, Aug. 4, 1989 Tr. at 133, and Judge Hinkel rejected their testimony, JA 28-29.

another apartment. The State also presented forensic evidence about the crime scene. Police officers had found fingerprints in Ms. Lacs' apartment, and had found a Ryder baseball cap on the floor. Neither the fingerprints found in the apartment nor forensic evidence taken from the cap matched Wiggins. No paint residue was found in the apartment.

Among the State's witnesses was Wiggins' girlfriend, Geraldine Armstrong. According to her testimony, Wiggins had arrived at her home at 8 p.m. on the 15th in Ms. Lacs' car, and asked to come in to wash off the paint from his work. Aug. 1, 1989 Tr. at 196-97. She testified that her brother Adolphus began an argument with Wiggins that escalated to a serious altercation in which her brother pulled a gun. She then testified that she and Wiggins then left to go shopping in Ms. Lacs' car and used Ms. Lacs' credit cards. She initially denied familiarity with the Woodlawn apartments where Ms. Lacs lived, but eventually admitted that her brother Melvin lived in an apartment beneath that of Ms. Lacs. *Id.* 201.

The defense then presented its case. It consisted principally of an expert in forensic pathology who testified that Ms. Lacs died no earlier than 3 a.m. on September 17, and that Wiggins therefore could not have committed the murder on the 15th. Aug. 4, 1989 Tr. at 133.

Wiggins was convicted. The court concluded that Ms. Lacs must have been robbed before her car and credit cards were used on the evening of the 15th; the robbery must have occurred when Ms. Lacs' apartment was ransacked; and Ms. Lacs must have been murdered when the apartment was ransacked. Notwithstanding the absence of any forensic or direct evidence connecting Wiggins to the murder, the court concluded that Wiggins must have been the murderer, because Wiggins was present at the apartment complex when (in the court's view) the robbery and ransacking must have occurred,

and he had possession of the stolen items later on September 15th. JA 29-32.

C. Sentencing

Immediately after the guilty verdict on August 4, 1989, defense counsel asked for a continuance to complete "preparation to take this case to a sentencing phase." JA 33. The court granted the request, and sentencing proceedings began on October 11, 1989. Wiggins' counsel chose jury sentencing, even though they had requested a bench trial to decide guilt because, in their view, Baltimore County juries are too "bent towards guilt" and "death oriented." *Id.* 500.

At the outset of the hearing, the judge instructed the jury that "Kevin Wiggins . . . has been found guilty of the murder of Florence Lacs in the first degree and the robbery of Florence Lacs." JA 53. Building on that instruction, the prosecution's opening statement repeatedly reminded the jury that Wiggins "has already been convicted . . . beyond a reasonable doubt" of murdering and robbing Ms. Lacs. *Id.* 57, 60. The prosecution then asserted that the evidence would show that Wiggins was eligible for the death penalty because he was a "principal in the first degree" in Ms. Lacs' death. The prosecution urged the jury to impose the death penalty because the aggravating circumstances outweighed any mitigating evidence that might support a life sentence.

Wiggins' lawyers opted for "retrying guilt" at the sentencing phase by contesting that Wiggins was a principal *i.e.*, the actual killer.[2] But counsel was forced to acknowledge

[2] On the eve of sentencing, defense counsel moved to bifurcate the sentencing hearing. They wanted to "retry guilt" in one phase, and then, if necessary, in a second phase, present mitigating evidence consisting of a psychiatric test that showed Wiggins was of borderline intelligence and had psychological problems. The court denied the motion. JA 34-46; Oct. 12, 1989 Tr. at 3.

in opening that "there is a guilty verdict in this case and, obviously, you are bound by that verdict. . . . He has been found guilty of first degree murder. Even if you heard all the evidence . . . and you concluded that Kevin Wiggins wasn't guilty of the murder, you have no power to do anything about that. He has been found guilty of first degree murder." JA 67-68.

The opening statement did not, however, focus only on the principalship issue. Counsel urged the jurors to "consider not only the facts of the crime," but also "who that person is." The jurors were promised that they would "hear that Kevin Wiggins has had a difficult life." Counsel stressed that the information was "an important thing . . . to consider." JA 70, 72.

The prosecution then presented its evidence, which largely mirrored its trial presentation, to establish that Wiggins was a principal in the death of Ms. Lacs. The prosecution also introduced a written presentence report prepared by the Department of Probation and Parole. *See* Md. Ann. Code art. 41 § 4-609(d) (1988) (requiring preparation and presentation of presentence report in capital cases). The report contained a brief description of Wiggins' "personal history," in which Wiggins was quoted as saying, without elaboration, that his childhood was "disgusting." JA 20. The report included a brief quote from one of Wiggins' sisters suggesting that she and Wiggins had been treated reasonably well in one of their foster homes. *Id.* 20-21. The report also contained a brief "physical and mental history" that stated that Wiggins had attempted suicide while in jail awaiting trial in this case, but otherwise had no physical, psychological, or emotional problems. *Id.* 23.

Wiggins' lawyers challenged the prosecution's factual case, much as they did at the guilt phase of the trial. They did not, however, offer any evidence to support the hypothesis that

someone other than Wiggins had the principal role in Ms. Lacs' murder, and that Wiggins was merely an accomplice. Nor did they follow through on their commitment to introduce evidence of Wiggins' difficult life. They did introduce the testimony of Dr. Robert Johnson, a criminology professor, who testified that inmates convicted of violent crimes who are serving life sentences tend to adjust well and to refrain from further violence in prison. JA 311-13. In testimony elicited by Wiggins' counsel, Dr. Johnson noted that Wiggins had committed rules infractions since being arrested for Ms. Lacs' murder and had verbally threatened jail staff. *Id.* 318.

After the defense rested, the judge again instructed the jury that "Kevin Wiggins has been convicted of murder in the first degree of Florence Lacs and the robbery of Florence Lacs. This conviction is binding upon you. Even if you believe the conviction to have been in error, you must accept that fact." JA 362. After explaining the standard for deciding whether Wiggins was a principal in the first degree, the judge then told the jury that "[i]t is your duty to weigh each of the factors, both aggravating and mitigating, to determine whether the sentence shall be life imprisonment or death." *Id.* The judge enumerated the statutory mitigating factors, and told the jury the stipulated fact that Wiggins had never before been convicted of a "crime of violence." *Id.* 367. Finally, the judge explained that, in addition to the statutory mitigators, the jury also "may consider evidence relating to the defendant's background." *Id.* 368.

In its closing, the State emphasized that "the defendant has been found guilty of the murder of Florence Lacs," and again summarized the evidence supporting the allegation that Wiggins was a principal in her death. JA 376-77.

In response, Wiggins' lawyers again conceded that Wiggins "has been convicted" and that the jury "cannot change

that." *Id.* 391. They nevertheless asked the jury to reach what counsel referred to as the "stunning conclusion . . . that you can't be sure beyond a reasonable doubt that Kevin Wiggins *had any role at all* in the murder of Ms. Lacs." JA 391 (emphasis added). Instead of contending that Wiggins was merely an accomplice and that someone else murdered Ms. Lacs, counsel contended that Wiggins could not be a "principal" because he had nothing to do with the murder. Although counsel had assured jurors that they would learn of Wiggins' "difficult life," the closing made no mention of it.

In rebuttal, the prosecution reiterated the trial judge's instruction that Wiggins "has been convicted of first degree murder and robbery" and that the jury's duty was to "consider his crime" and "weigh that . . . against what you know about his background." JA 404, 407.

The jury sentenced Wiggins to death. After concluding that he was a principal in Ms. Lacs' death, the jury found that the aggravating fact that the murder occurred in the course of a robbery outweighed any mitigating evidence. It found none of the statutory mitigating factors other than the stipulated fact that Wiggins had never been convicted of a crime of violence. JA 409. At least one juror found that Wiggins' "background" was a non-statutory mitigating factor. *Id.* 368-69, 409.

A divided Maryland Court of Appeals affirmed.

D. State Postconviction Proceedings

In 1993, Wiggins filed a petition for postconviction relief with the Baltimore County Circuit Court. The case was assigned to the Honorable John F. Fader II, who held seven days of hearings between January 7 and May 25, 1994.

The court received expert testimony from Hans Selvog, a licensed social worker who had prepared a social history of

Wiggins. Selvog testified that he had prepared social histories for death penalty cases since 1986 and had been qualified as an expert in several capital cases, including six in Maryland. JA 414-15. Judge Fader qualified Selvog as an expert. *Id.* 419.

The social history revealed that Wiggins suffered horrible abuse throughout his childhood. His mother, a chronic alcoholic, frequently left Wiggins and his sisters alone for days. Pet. App. 165a-167a. She would hide food, leaving the children to beg or pick food from trash cans. *Id.* 166a-167a. The children often went hungry for days; Wiggins ate paint chips to quell his hunger. *Id.* 167a. When his mother returned home to find that her children had eaten the food she had hidden, she would beat them with belts, straps, even furniture. *Id.* 167a-168a. She would have sex in front of the children, sometimes while they were in the same bed. *Id.* 171a. Wiggins also witnessed a boyfriend of his mother repeatedly molest his sister India. *Id.* On one occasion, according to India, Wiggins' mother punished Wiggins for playing with matches by forcing his hands against a red-hot kitchen stove burner, and then refused to take him for medical care until hours later. *Id.* 169a-171a.

As a result of being abandoned for several days, Wiggins and his sisters were placed in foster care when he was six. Pet. App. 173a. His first foster mother's methods of discipline included biting the children and twisting their flesh. *Id.* 175a-176a. That abuse led to the children being placed in a new foster home. *Id.* The second foster mother beat the children with straps and belts. *Id.* 176a. Her husband subjected Wiggins to years of sexual abuse, often on a daily basis, beginning with molestation when Wiggins was eight years old and escalating to rape sometime later. *Id.* 177a-179a. Shortly after this sexual abuse began, Wiggins lost interest in eating, and became so malnourished that he was hospitalized. *Id.*

179a. An I.Q. test taken at that time indicated a borderline retardation level of 72. *Id.* 181a.

Wiggins ran away from the second foster home at age 16. Pet. App. 184a. He lived on the street for a time, and spent brief periods in other foster homes. *Id.* 184a-188a. He eventually returned to his second foster home because it provided some stability. *Id.* 188a. After a few months, however, Wiggins was again moved. *Id.* 189a. In the next foster home, he and other foster children were raped repeatedly by the foster mother's teenage sons. *Id.* 190a. After Wiggins left the foster care system, he entered a Job Corps program, where his supervisor befriended and then sexually molested him. *Id.* 192a-193a. When Wiggins was 18, an examination indicated mental retardation, cranial pathology, and possible head trauma. *Id.* 192a.

Selvog testified that Wiggins' experiences "left him confused" and "frightened constantly." JA 430. Wiggins tried to deal with that fear by "trying not to think about anything." *Id.* He was so traumatized that in one instance in his childhood he tried to fly out a window. *Id.* By age eight he displayed short-term memory problems, hallucinations, and "blank-out spells." *Id.* 438. Selvog found that disorientation and "staring into space" were consistent symptoms throughout Wiggins' foster placements, *id.* 445, and he testified that Wiggins' mental and emotional problems were characteristic results of the sort of abuse and neglect reported in the social history, *id.*

Wiggins' trial counsel also testified. Nethercott acknowledged that she had never participated in a capital trial before defending Wiggins, had less than one year's experience as a public defender when she began representing him, and had participated in only one or two jury trials of any kind. *Id.* 514-15. She testified that Schlaich was lead counsel, and that the work was distributed evenly between them until Schlaich left

for the Harford County office, not long after they were appointed. At that point she took "primary responsibility for preparation of the case" and admitted that she "was frankly overwhelmed." *Id.* 532, 529. She explained, however, that developing mitigating evidence in preparation for sentencing was Schlaich's responsibility, not hers. *Id.* 539-40.

Schlaich testified that he had previously second-chaired one capital case. He also testified that he left the Baltimore County public defender's office in 1988 to work in the Harford County office, and thereafter spent about one day a week on the "two major cases" he still had pending in Baltimore County, one of which was Wiggins' case. JA 476. Schlaich confirmed that, after he left for Harford County, Nethercott "did most of the work" on Wiggins' case. *Id.* 478. Schlaich claimed Nethercott had primary responsibility for developing mitigation evidence. *Id.* 485.

Schlaich further stated that he and Nethercott decided well in advance of trial to "retry the factual case" at the sentencing phase. JA 485-86. Schlaich explained that he preferred not to use a "shotgun approach" of presenting multiple defenses in the same proceeding. *Id.* 504-05. Schlaich also acknowledged that he did not retain a forensic social worker to prepare a social history, even though funds were available to do so, and even though he was aware that public defenders in Maryland routinely prepared social histories in other capital cases. *Id.* 487-88, 489-90. Schlaich was not familiar with this Court's decisions in *Lockett v. Ohio*, *Eddings v. Oklahoma*, and *Penry v. Lynaugh*. *Id.* 491.

Schlaich initially claimed that he knew the details of Wiggins' nightmarish upbringing, but quickly backtracked, clarifying that he knew only "that [information] as it was reported in other people's reports," *i.e.*, the records of the Department of Social Services in his possession. *Id.* 490-91.

Finally, Schlaich opined, in response to a hypothetical question from the State, that presenting mitigating evidence sometimes allowed the State to bring out additional information that made the defendant seem more dangerous. *Id.* 506. Schlaich did not testify that there was anything about Wiggins' background that could have undermined a mitigation case in this way. The State did not try to elicit any such testimony or otherwise introduce evidence of past violence or other harmful facts about Wiggins.

The court also received expert testimony from Gerald Fisher, a criminal defense attorney and law professor with extensive experience working on capital cases.[3] Judge Fader qualified Fisher as an expert on attorney competence in capital cases. JA 560. Fisher testified that Wiggins' trial attorneys did not investigate mitigation evidence as required by applicable professional norms. *Id.* 566-67. Fisher explained that training conferences – including a conference Schlaich admitted he had attended, JA 479-80, 569 – had emphasized for years the importance of investigating and presenting a mitigation case. *Id.* 568-69. In Fisher's opinion, capital defense counsel cannot make a "sound strategic decision" not to investigate a client's background because it is imperative to know how strong the mitigation case is before choosing a sentencing strategy. *Id.* 568-69, 575-76. As he put it, "[y]ou can't make your decisions in a vacuum." *Id.* 599-600.

He explained that Wiggins' background of "deprivations and neglect" presented "among the strongest" mitigation cases he had "ever seen," and that Wiggins' lawyers fell far below the minimum required of capital counsel in not developing and presenting this evidence. JA 567; *see also id.* 573-74. Fisher acknowledged that presenting mitigation evidence might sometimes open the door to unfavorable information. He

[3] Fisher is now a judge of the Superior Court of the District of Columbia.

explained, however, that such a risk cannot justify a failure to investigate:

> Every defense has problems but you have to go out and investigate it, develop it, decide on the presentation and then weigh what is going to go on with that presentation in determining whether to use it or not to use it. So as a kind of preliminary step that wasn't done.

Id. 581. Fisher also testified that both mitigation evidence about Wiggins as an individual and evidence that there was reasonable doubt whether Wiggins committed the crime could have been consistently presented at sentencing, and that he had seen defense attorneys rely on such a strategy. *Id.* 591-92.[4]

E. State Postconviction Decisions

At the conclusion of the state postconviction proceedings, Judge Fader ruled from the bench that trial counsel's performance fell below minimum Sixth Amendment standards as established in *Strickland v. Washington*, 466 U.S. 668 (1984): "[I]t was error for [Wiggins' counsel] not to investigate" mitigating evidence. JA 605; *see also id.* 604-05. He then stated:

> I don't ever remember a death penalty case that there was not this social history done. . . . Not to do a social history, at least to see what you have got, to me is absolute error. I just – I would be flabbergasted if the Court of Appeals said anything else. I really don't think that that is even a close question . . . .

[4] Geraldine Armstrong was also called as a witness at the postconviction hearing. She invoked the Fifth Amendment in response to all questions about her involvement in the murder and robbery of Ms. Lacs. Mar. 28, 1994 Tr. at 75-77.

Id. 605. The court also found that Wiggins' lawyers had no prior knowledge of the mitigation evidence contained in the social history. *Id.* 606. Having ruled for Wiggins on the performance prong of the *Strickland* test, Judge Fader reserved the issue of prejudice and announced that he would issue a decision within 60 days. Apr. 7, 1994 Tr. at 75; May 25, 1994 Tr. at 14-15.

Three and a half years later, the court issued a written decision rejecting Wiggins' *Strickland* claim. Without mentioning his own prior ruling that counsel's performance fell below minimum professional requirements, the judge opined that counsel's performance was immune from Sixth Amendment challenge because Schlaich made a "tactical" decision to retry guilt. The court's opinion contains no finding that Wiggins' lawyers conducted an adequate investigation into mitigation evidence or made an *informed* decision to retry guilt to the exclusion of a mitigation case. The court simply held that "when the decision not to investigate [] is a matter of trial tactics, there is no ineffective assistance of counsel." Pet. App. 155a. The court's ruling confirmed that Wiggins' social services records contained no evidence of physical or sexual abuse. *Id.* 142a n.269.

The Maryland Court of Appeals affirmed. Pet. App. 121a-127a. Without mentioning the contrary findings made by the postconviction court that heard the evidence, the appeals court stated that "[c]ounsel were aware that [Wiggins] had a most unfortunate childhood" and, specifically, that the social services records "recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline retardation." *Id.* 121a. Because the court believed that Wiggins' lawyers "*were* aware of his background," it rejected Wiggins' Sixth Amendment claim. *Id.* 123a-126a.

F. Federal Postconviction Review

Wiggins filed a timely petition for relief in the United States District Court for the District of Maryland, pursuant to 28 U.S.C. § 2254, on August 6, 1999. Applying the standard of review set forth in 28 U.S.C. § 2254(d)(1), as explained in *Williams v. Taylor*, 529 U.S. 362, 412 (2000), Chief Judge Motz granted the petition.

The court invalidated Wiggins' conviction because the Maryland courts had unreasonably applied *Jackson v. Virginia*, 443 U.S. 307 (1979), which held that a criminal conviction denies due process if a reasonable factfinder could not have concluded that every element of the offense was proved beyond a reasonable doubt. Pet. App. 42a-50a. The district court also invalidated Wiggins' death sentence on the ground that the state courts had unreasonably applied *Strickland*. That result, the court concluded, followed from *Williams*. As in *Williams*, Wiggins' counsel had failed to investigate and prepare a case in mitigation. Prejudice existed because "Wiggins' mitigation evidence was much stronger, and the State's evidence favoring imposition of the death penalty was far weaker, than the comparable evidence in *Williams*." Pet. App. 51a.

The court declined to distinguish *Williams* on the ground that counsel's conduct here was the result of a legitimate tactical decision. First, the court concluded that counsel's decision to "retry" guilt was uninformed, and thus unreasonable, because counsel had no appreciation of the powerful mitigation evidence available. Although counsel had Wiggins' social services records, Chief Judge Motz reviewed those records and confirmed the state postconviction court's factual finding that they did not contain the evidence of squalor and abuse presented during postconviction proceedings. Pet. App. 53a-54a. The district court therefore rejected the Maryland Court of Appeals' "erroneous assumption that much

of the critical information uncovered by the social history commissioned by post-conviction counsel had been contained in social service records available to trial counsel." *Id.* 54a n.16.

Second, the district court found that counsel's choice here was so ill-advised that it could not be justified even if it had been informed. Pet. App. 55a. Because Wiggins had no criminal record, there was no danger that the State would bring out damaging evidence in response to a case in mitigation. *Id.* 55a & n.17. Moreover, mitigation evidence could have been introduced in concert with evidence that Wiggins did not commit the murder, to present "an effective argument that Wiggins had been made the pawn of others who were responsible for the murder." *Id.* 55a n.17; *see also id.* 44a n.9.

The Fourth Circuit reversed. Invoking circuit precedent predating this Court's decision in *Williams v. Taylor*, the court held that a state court decision would pass muster under 28 U.S.C. § 2254(d)(1) so long as it was "minimally consistent with the facts and circumstances of the case." Pet. App. 11a. Applying that standard, the court rejected Wiggins' ineffectiveness claim.[5] The court believed that *Strickland* warranted relief only for a "particularly glaring failure of counsel's duty to investigate," and concluded that "avoidance of conflicting arguments supported the limited investigation into social history." Pet. App. 19a, 23a. The court also concluded that Wiggins' counsel knew the facts of Wiggins'

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[5] The Fourth Circuit also reversed the district court's decision with respect to the conviction. Pet. App. 17a. Chief Judge Wilkinson concurred. Though stating his view that Wiggins "very probably" committed the crime of which he was convicted, the Chief Judge was unable to "say with certainty that he did so," and noted "unexplained items" of evidence such as "the unidentified fingerprints, baseball cap, fibers and hairs," as well as the fact that Wiggins "had no prior record." *Id.* 24a & n.*.

childhood "as they existed in the presentence investigation report and social services records," including (in the court's view) that there "were reports of sexual abuse at one of his foster homes; that he had had his hands burned as a child as a result of his mother's abuse; [and] that there had been homosexual overtures made toward him by a job corps supervisor." *Id.* 20a. The court did not mention the specific findings of the state postconviction court that Wiggins' counsel did not know about Wiggins' history of abuse and that the social services records did not document that history. Nor did the appeals court mention the district court's finding, based on an examination of the social services records, *id.* 53a-54a nn.15-16, that those records did not contain evidence of abuse.

Writing separately, Judge Niemeyer questioned whether "the State court reasonably applied *Strickland*," and opined that "[counsel] could have insisted on arguing liability and still have maintained that any death sentence would be inconsistent with the mitigating circumstances of Wiggins' miserable upbringing and marginal intelligence." Pet. App. 25a. He nevertheless concurred, but with "less confidence." *Id.* 26a.

SUMMARY OF ARGUMENT

As this Court's ruling in *Williams v. Taylor* makes clear, the decision of the Maryland Court of Appeals in this case was both "contrary to" and an "unreasonable application of" *Strickland v. Washington*. Wiggins' trial counsel completely failed to develop the powerful mitigation case available to them. The jury that sentenced Wiggins to death never heard voluminous compelling evidence of Wiggins' horrific childhood – including repeated physical and sexual abuse – and his marginal intelligence. Wiggins was thus denied his constitutional right to effective assistance of counsel.

It is an "obvious truth" that "in our adversary system of criminal justice, any person haled into court, who is too poor to afford a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *see also Powell v. Alabama*, 287 U.S. 45 (1932). It is equally clear that "'the right to counsel is the right to effective assistance of counsel.'" *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). Indeed, "'[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective . . . .' Unless the accused receives the effective assistance of counsel, 'a serious risk of injustice infects the trial itself.'" *United States v. Cronic*, 466 U.S. 648, 655-56 (1984) (citation omitted). Counsel's duty is "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688.

In the capital sentencing context, a "reliable adversarial testing process" generally requires that counsel present to the sentencing jury evidence of "the character and record of the individual offender and the circumstances of the particular offense," to allow the jury to reach the "reasoned moral response" to punishment required by the Constitution. *Eddings v. Oklahoma*, 455 U.S. 104, 111-12 (1982) (internal quotation marks and citation omitted). For only when all of the available information about the offender and the offense is subjected to the adversarial process "can [we] be sure that the jury has . . . made a reliable determination that death is the appropriate sentence." *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (internal quotation marks and citation omitted).

In *Williams*, this Court emphasized that, to meet the constitutional imperative established in *Strickland*, counsel must conduct the "requisite diligent investigation" into

mitigating evidence. In the wake of *Strickland*, a powerful judicial consensus has emerged among the federal courts of appeals and state supreme courts that "defense counsel has the obligation to conduct a reasonably substantial, independent investigation into potential mitigating circumstances." *Neal v. Puckett,* 286 F.3d 230, 236-37 (5th Cir. 2002) (en banc) (internal quotation marks and citation omitted), *petition for cert. filed* (U.S. filed June 13, 2002) (No. 01-10886). "Prevailing norms of practice," including standards issued by the American Bar Association, reflect the same consensus.

The Maryland Court of Appeals nevertheless held that counsel had performed effectively, and the Fourth Circuit upheld that ruling under § 2254(d) on the ground that counsel had made a "tactical" choice to focus exclusively on retrying guilt to the exclusion of making a mitigation case. But *Strickland* precludes deference to "tactical" choices when, as here, they are not supported by adequate prior investigation. The plain fact is that Wiggins' counsel did not know about the compelling mitigation evidence available. To defer to the "strategic" choices of counsel in such circumstances is contrary to, and an objectively unreasonable application of, *Strickland*.

Moreover, even if counsel's decision to retry guilt at the expense of presenting mitigation evidence could be considered "tactical," it was "virtually inexplicable," Pet. App. 55a, and any state decision upholding it is objectively unreasonable. Counsel knew well in advance of the hearing that the sentencing jury would receive a presentence report briefly describing Wiggins' personal history and mental health status. The decision to retry guilt thus did not remove the question of Wiggins' background and character from the sentencing process, but merely resulted in Wiggins' life history being assessed on the basis of two desultory and inaccurate paragraphs in the presentence report, and not on the basis of the

powerful mitigation evidence that could have been presented by Wiggins' own advocates.

In addition, counsel did not even follow through on their purported strategy of focusing exclusively on retrying guilt. Instead, counsel told the jury that it would hear of Wiggins' "difficult life," then presented literally nothing of that life, offering instead only testimony that Wiggins would "settl[e] into jail life." Counsel thus adopted the "shotgun approach" he testified he hoped to avoid, while omitting all of the compelling mitigation evidence.

As if that were not enough, the decision to forgo mitigation evidence was particularly egregious because such evidence would have complemented, rather than undermined, counsel's chosen "strategy" of attempting to convince the jury that Wiggins was not a principal to the murder. That strategy collapsed of its own weight due to counsel's failure to offer the jury any alternative principal despite the ready existence in the record of such a person. But the critical point recognized by both the district court and Judge Niemeyer is that much of the mitigation evidence would have *supported* counsel's principalship argument by suggesting that Wiggins was susceptible to manipulation and could easily have been made the pawn of others who were responsible for the murder. In short, counsel's failure to investigate and present Wiggins' powerful mitigation evidence was deficient performance, and the Maryland courts' opposite conclusion is both contrary to, and an unreasonable application of, *Strickland*.

Finally, Wiggins was obviously prejudiced by his counsel's failures. That conclusion follows *a fortiori* from *Williams*. The mitigation evidence that competent trial counsel would have discovered concerning Wiggins' background was even more compelling than the evidence left undiscovered in *Williams*, and the aggravating evidence was far weaker because,

in stark contrast to Williams, Wiggins had no criminal record at all. The conclusion that the compelling mitigation evidence "might well have influenced the jury's appraisal of his moral culpability" is inescapable. Accordingly, relief under § 2254(d) is warranted, and the Fourth Circuit's contrary conclusion should be reversed.

ARGUMENT

I. THE PERFORMANCE OF WIGGINS' COUNSEL FELL FAR SHORT OF THE STANDARD OF EFFECTIVE REPRESENTATION SET FORTH IN *STRICKLAND V. WASHINGTON.*

Because this case was brought pursuant to 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act, the question before this Court is whether the adjudication of Wiggins' Sixth Amendment claim by the Maryland courts "resulted in a decision that [is] contrary to, or involved an unreasonable application of, clearly established Federal law" as determined by this Court. 28 U.S.C. § 2254(d)(1). In *Williams v. Taylor*, this Court clarified that relief is warranted under § 2254 if a state court's application of clearly established federal law is "objectively unreasonable," 529 U.S. at 409. Thus, contrary to the Fourth Circuit's ruling in this case, state court rulings do not pass muster merely by being "minimally consistent with the facts and circumstances of the case." Pet. App. 11a. And *Strickland v. Washington* is indisputably "clearly established" law. Under *Strickland*, counsel's performance is ineffective for Sixth Amendment purposes if it is not reasonable "under prevailing professional norms." 466 U.S. at 688. As will be shown, the decision of the Maryland courts that Wiggins' lawyers fulfilled their Sixth Amendment obligations is both contrary to, and an objectively unreasonable application of, *Strickland*. Indeed, that conclusion follows directly from *Williams*, which applied

Strickland under § 2254 to invalidate a death sentence where defense counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background." 529 U.S. at 396.

A. *Strickland* Generally Requires Defense Counsel in Capital Cases to Conduct a Thorough Investigation for Mitigation Evidence.

To assess what *Strickland* demands of defense counsel in a capital case, it is critical to understand the unique nature of capital sentencing. At a capital sentencing hearing, the defendant stands convicted of murder, and the issue is whether the defendant should be condemned to die. The process is structured to focus the sentencer on the *extent* of the defendant's personal culpability. Indeed, for a quarter century, this Court's Eighth Amendment jurisprudence has required that capital sentencing procedures implement "the principle that punishment should be directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh*, 492 U.S. 302, 319-20 (1989) (explaining *Eddings*, 455 U.S. at 111 and *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). A capital sentencer must, therefore, be afforded the opportunity to assess "the character and record of the individual offender," as well as "the circumstances of the particular offense." *Eddings*, 455 U.S. at 112 (internal quotation marks and citation omitted). As this Court has explained,

> [i]f the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.

Penry v. Lynaugh, 492 U.S. at 319 (internal quotation marks and citation omitted); *see also Penry v. Johnson*, 532 U.S. at 797; *Johnson v. Texas*, 509 U.S. 350, 375 (1993) (O'Connor, J., dissenting). The sentencer's constitutionally prescribed task is thus to render "a reasoned moral response" to the unique individual circumstances of the capital defendant. *Penry v. Lynaugh*, 492 U.S. at 327; *see also California v. Brown*, 479 U.S. 538 (1987) (O'Connor, J., concurring); *Eddings*, 455 U.S. at 111 (consideration of offender's life history is a "constitutionally indispensable part of the process of inflicting the penalty of death").

To ensure that capital sentencers can fulfill this obligation, this Court has repeatedly struck down state-imposed barriers to full consideration of such evidence. *See, e.g., Eddings*, 455 U.S. at 113-15 (invalidating sentence where state decision allowed as mitigation evidence only evidence that would tend to excuse criminal liability); *Lockett v. Ohio*, 438 U.S. 586, 597 (1978) (invalidating Ohio law that did not permit consideration of, *inter alia*, defendant's character, age, prior record, lack of specific intent to cause death, and role in the crime); *Penry v. Lynaugh*, 492 U.S. at 322 (reversing conviction because jury had no vehicle to express a "reasoned moral response" to evidence of mental retardation and childhood abuse); *Skipper v. South Carolina*, 476 U.S. 1, 2 (1986) (reversing conviction when State prohibited consideration of evidence that defendant "made a good adjustment" during his time in jail); *Sumner v. Shuman*, 483 U.S. 66, 77-78 (1987) (invalidating statute that prohibited individualized consideration for defendant convicted of murder while serving a life sentence); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (invalidating Florida sentencing instructions that forbade jury from considering nonstatutory mitigating evidence); *Mills v. Maryland*, 486 U.S. 367, 384 (1988) (holding that State may not restrict juries to giving effect only to mitigating circumstances as to which all jurors agree).

A lawyer's failure to prepare and present a case in mitigation can threaten the reliability of the sentencer's "reasoned moral response" fully as much as these state-imposed impediments. *See, e.g., Williams*, 529 U.S. at 396-98; *see also Penry v. Johnson*, 532 U.S. at 797 (jury must "be able to consider and give effect to [a defendant's mitigating] evidence in imposing sentence") (internal quotation marks and citation omitted; alteration in original). As the Court observed in a related context, defense counsel's failure to conduct an adequate investigation "puts at risk both the defendant's right to an ample opportunity to meet the case of the prosecution, and the reliability of the adversarial testing process." *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (internal quotation marks and citation omitted). The prosecution's case for death will usually focus on the facts of the crime, harm to the victim's family, and the negative aspects of the defendant's character and life history. To meet that case, defense counsel must give the jury a reason to spare the defendant's life. Typically, that will mean adducing evidence of the defendant's background and character that might "reduce [a defendant's] moral responsibility . . . to a level at which capital punishment would strike [a] juror as excessive." *Emerson v. Gramley*, 91 F.3d 898, 907 (7th Cir. 1996) (Posner, J.). It is only when the sentencing jury has the opportunity to consider all available mitigation evidence, and the prosecution's case for death has thus been subject to full adversarial testing, that "we can be sure that the jury has . . . made a reliable determination that death is the appropriate sentence." *Penry v. Johnson*, 532 U.S. at 797 (internal quotation marks and citation omitted).

Williams v. Taylor reaffirmed in the clearest possible terms that capital defense counsel's duty under *Strickland* must be measured by reference to the unique requirements of capital sentencing, and that counsel's duty therefore must generally encompass a thorough investigation of the defendant's life

history. *See Strickland*, 466 U.S. at 691 (explaining counsel's "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). Trial counsel in *Williams* failed to conduct an investigation that would have uncovered evidence of Williams' "nightmarish" childhood. This Court held that trial counsel had failed to fulfill their "obligation to conduct a thorough investigation of the defendant's background." 529 U.S. at 396. Justice O'Connor (joined by Justice Kennedy) reiterated in concurrence that Williams' counsel had failed to conduct the "requisite, diligent investigation" into Williams' "troubling background and unique personal circumstances." *Id.* at 415 (O'Connor, J., concurring).

Williams broke no new ground. It merely confirmed the consistent understanding of numerous courts of appeals that *Strickland* requires a thorough investigation for mitigation evidence, and that counsel's failure to do so constitutes deficient performance absent an extremely strong reason for believing such an investigation unwarranted. As the *en banc* Fifth Circuit recently held unanimously, "we consider it indisputable that, in the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a reasonably substantial, independent investigation into potential mitigating circumstances." *Neal v. Puckett*, 286 F.3d at 236-37 (internal quotation marks and citation omitted). Indeed, it is well-established in the courts of appeals that "[i]n a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." *Stouffer v. Reynolds*, 168 F.3d 1155, 1167 (10th Cir. 1999) (internal quotation marks and citation omitted); *see also Hill v. Lockhart*, 28 F.3d 832, 845 (8th Cir. 1994) (professional norms require defendant's lawyers "to collect as much information as possible about [the defendant] for use at the penalty phase of his state court trial"); *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994) ("An attorney has

a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigation evidence."); *Coleman v. Mitchell*, 268 F.3d 417, 450 (6th Cir. 2001) (case law "has strongly established defense counsel's Sixth Amendment duty to independently investigate in preparation for the penalty phase of a capital trial"); *see also Mayfield v. Woodford*, 270 F.3d 915, 927-28 (9th Cir. 2001) (en banc); *Jermyn v. Horn*, 266 F.3d 257, 304-08 (3d Cir. 2001); *Emerson v. Gramley*, 91 F.3d at 905-07.

The state courts have consistently interpreted *Strickland* the same way. Thus, "the failure to *present* mitigating evidence at trial can be reasonable if shown to be the result of [a] tactical decision, the failure to *investigate* the existence of such evidence is ineffective assistance of counsel." *State ex rel. Busby v. Butler*, 538 So. 2d 164, 171 (La. 1988); *see also Rose v. Florida*, 675 So. 2d 567, 572 (Fla. 1996) ("It is apparent from the record that counsel never attempted to meaningfully investigate mitigation, and hence violated the duty of counsel to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence.") (internal quotation marks and citation omitted); *Goad v. Tennessee*, 938 S.W.2d 363, 370 (Tenn. 1996) ("[C]ounsel's duty to investigate and prepare for a capital trial encompasses both the guilt and sentencing phases."); *Hodge v. Kentucky*, 68 S.W.3d 338, 344 (Ky. 2002) ("[I]t appears that neither [defendant's] defense counsel conducted any investigation . . . . If there was no investigation, then their performance was deficient."); *Turpin v. Christenson*, 497 S.E.2d 216, 227 (Ga. 1998) ("[B]efore selecting a strategy, counsel must conduct a reasonable investigation into the defendant's background for mitigation evidence to use at sentencing."); *Illinois v. Morgan*, 719 N.E.2d 681, 704 (Ill. 1999) ("[D]efense counsel has a duty to make a reasonable investigation for mitigation evidence to present at the capital

sentencing hearing, or must have a sound reason for failing to make a particular investigation."); *Pennsylvania v. Smith*, 675 A.2d 1221, 1233 (Pa. 1996) (finding counsel ineffective when "[t]rial counsel neither pursued nor presented any evidence of mental state at the penalty phase even though some evidence may have existed"); *Delaware v. Wright*, 653 A.2d 288, 299 (Del. Super. Ct. 1994) ("While there is no absolute duty to present all potentially mitigating evidence for use at the penalty stage, defense counsel has a general duty to investigate potentially mitigating evidence.").

This powerful judicial consensus mirrors a comparable unanimity among professional organizations and commentators. This Court has repeatedly observed that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." *Strickland*, 466 U.S. at 688-89; *see also id.* (citing *ABA Standards for Criminal Justice*); *Williams*, 529 U.S. at 396 (relying on *ABA Standards for Criminal Justice* in finding counsel ineffective). For decades, standards promulgated by the ABA and other organizations have emphasized that undertaking a thorough investigation for mitigating evidence is one of the core responsibilities of counsel in a capital case. The *ABA Standards* upon which this Court relied in *Williams*, 529 U.S. at 396, provide that "[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to the facts relevant to the merits of the case and the penalty in the event of conviction." 1 *ABA Standards for Criminal Justice* 4-4.1 (2d ed. 1980).

The *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (Feb. 1989) similarly state that "immediately upon counsel's entry into the case," counsel in a capital case "should conduct independent investigations relating to the

guilt/innocence phase and to the penalty phase of a capital trial." Guideline 11.4.1(A). For the sentencing phase, the investigation "should comprise efforts to discover all reasonably available mitigating evidence," *id.* 11.4.1(C), and counsel should "seek information to present to the sentencing entity or entities in mitigation or explanation of the offense and to rebut the prosecution's sentencing case," *id.* 11.8.3(A); *see also* National Legal Aid and Defender Association, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* Standard 11.4.1 (1988) (adopting similar standards).[6]

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[6] Widely available trial manuals promulgated by experienced capital litigators similarly emphasize the importance of an early, thorough investigation. *See, e.g.*, Molly T. Johnson & Laural L. Hooper, Federal Judicial Center, *Resource Guide for Managing Capital Cases* 13 (2001) ("defense counsel at the very least will have to investigate statutory and nonstatutory mitigating factors in preparing an adequate defense"); Subcommittee on Federal Death Penalty Cases Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (1998), *available at* http://www.uscourts.gov/dpenalty/1COVER.htm ("In order to effectuate the defendant's right to present any information in mitigation of sentence, counsel must conduct a broad investigation of the defendant's life history."); 3 Anthony Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases* § 468-A, at 307 (1989) (in a capital case, "[a]n exhaustive investigation of the defendant's background . . . is indispensable"); The Equal Justice Initiative of Alabama, *Alabama Capital Defense Trial Manual* 31 (3d ed. 1997) ("No capital case can be adequately litigated without your having first conducted a painstakingly thorough investigation into . . . the defendant's personal background and his or her life history."); 1 *Tools for the Ultimate Trial: Tennessee Death Penalty Defense Manual* 5.4 (3d ed. 1992) ("Defense investigation is the only weapon available to hinder the state's penchant for hyperbole . . . ."); Nebraska Commission on Public Advocacy, *Standards for Indigent Defense Services in Capital and Non-Capital Cases* Standard VIII (1996) ("The investigation for the sentencing phase must be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all mitigating

In short, there is an overwhelming consensus, as *Williams* confirms, that defense counsel in a capital case must conduct a reasonable investigation into potential mitigation evidence in order to ensure that the sentencer has the opportunity to render a "reasoned moral response" to the defendant's background and character, and thereby ensure the "reliable adversarial testing process" required by *Strickland*.

B. The Performance of Wiggins' Trial Counsel Fell Far Short of This Established Standard.

Wiggins' counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396. Because they failed to undertake the "requisite diligent investigation," *id.* at 415 (O'Connor, J. concurring), they failed to develop a powerful mitigation case that could well have convinced the jury to spare Wiggins' life.

The Maryland courts nonetheless held that Wiggins' lawyers had performed effectively, and the Fourth Circuit upheld that ruling under § 2254(d), on the ground that counsel had made a reasonable tactical decision to "retry guilt" to the exclusion of making a mitigation case. As will be shown, that

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evidence . . . .").

Commentators have also recognized that "reasonable counsel must investigate the defendant's background and present some mitigating evidence." Ivan K. Fong, Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 Stan. L. Rev. 461, 491 (1987); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323, 341-42 (1993) ("[E]xperienced capital defense attorneys categorically reject the idea that the utility of evidence relating to the defendant's background or mental health can be determined before an investigation."); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 323-25 (1983) (same).

result is objectively unreasonable under *Strickland* for two fundamental reasons.

First, Wiggins' counsel could not possibly have made a "reasonable" tactical decision to retry guilt without first having thoroughly investigated mitigation. Ignorant of the powerful mitigation case available to them, they were in no position to know whether "retrying guilt" was a more propitious strategy than presenting a case in mitigation. Thus, Wiggins' lawyers neither made "reasonable investigations" into Wiggins' life history, nor made a "reasonable decision" that made such an investigation "unnecessary," *Strickland*, 466 U.S. at 691.

Second, even apart from the failure to investigate, counsel's failure to present mitigation evidence was – in the words of the district court – "virtually inexplicable" in light of what counsel knew before the sentencing proceeding and did at that proceeding. Pet. App. 55a. As early as July 1989, Wiggins' lawyers knew that a presentence report would be submitted to the jury containing a parole officer's rendition of Wiggins' personal history, which set forth an innocuous description of Wiggins' life history and mental health. By not answering that report, Wiggins' lawyers left the jury with the false and injurious impression that his background provided no basis for mitigation. Moreover, contrary to Schlaich's postconviction testimony, Wiggins' lawyers did not focus solely on retrying guilt, and thus cannot justify their failure to develop and present mitigation evidence on that basis. Wiggins' lawyers told the sentencing jury that they would present evidence of his "difficult life" and then failed to so, and instead made a passing stab at mitigation by putting on an expert who suggested that violent offenders adapt well to prison if given a life sentence. Counsel's failure was all the more egregious because the mitigation evidence would have

bolstered counsel's efforts to prove that Wiggins was not a principal in Ms. Lacs' murder.

1. Wiggins' Lawyers Did Not Conduct the Requisite Diligent Investigation into Mitigation Evidence Before Deciding to Retry Guilt.

The decision of the Maryland Court of Appeals cannot be defended as objectively reasonable on the ground that the purported choice by Wiggins' lawyers to "retry guilt" absolved them of their duty to investigate his personal history. It has never been the law that all decisions labeled "tactical" are *per se* beyond reproach. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). *Strickland* imposes a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," and requires that "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances." 466 U.S. at 691. Deciding at the outset to retry guilt rather than develop a case in mitigation is not a "reasonable decision" that makes investigation into mitigation unnecessary, for the obvious reason that counsel cannot know until after investigation whether the mitigation case would be a stronger basis for avoiding a death sentence.

Legions of cases have interpreted *Strickland* to preclude deference to tactical choices unsupported by adequate prior investigation. As the Eleventh Circuit has noted, "case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991); *see also Coleman v. Mitchell*, 268 F.3d at 447-54 (counsel could not make a reasoned decision to forgo mitigation in favor of a residual doubt defense because

counsel had not investigated, and therefore did not realize he could have presented a powerful case based on the defendant's abusive childhood); *Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir. 2000) (finding *Strickland* violation, even though counsel's decision could "be considered a strategic one, [because] it was a decision made without undertaking a full investigation"); *Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001) (counsel's decision to focus on "sympathy and mercy," rather than a mitigation case, was unreasonable when counsel did not thoroughly investigate available mitigation evidence before choosing his strategy); *Antwine v. Delo*, 54 F.3d 1357, 1367 (8th Cir. 1995) ("if limiting the investigation was not reasonable, then neither was the subsequent strategic choice"); *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) ("Thus, our case law rejects the notion that a strategic decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.") (internal quotation marks and citation omitted).[7] Indeed, in the absence of a thorough investigation, counsel cannot "competently advise [a client] regarding the meaning of mitigation evidence and the availability of possible mitigation strategies," much less make an informed decision about which course to pursue.

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[7] State courts have done the same. As the Supreme Court of Georgia observed, "an attorney's strategic decision is not reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Turpin v. Christenson*, 497 S.E.2d at 227 (internal quotation marks and citation omitted); *see also Illinois v. Orange*, 659 N.E.2d 935, 950 (Ill. 1995) (deference to strategic decisions not to present mitigation evidence "is not warranted where there is proof that the lack of mitigating evidence is due to counsel's failure to properly investigate and prepare the defense."); *Rose v. Florida*, 675 So. 2d at 572 (counsel's decision "was neither informed nor strategic" when "there was no investigation of options or meaningful choice"); *Delaware v. Wright*, 653 A.2d at 301 ("[B]efore deciding not to use such [mitigation] information, defense counsel must have adequately investigated the mitigating evidence available and made a strategic choice not to use it.").

Battenfield v. Gibson, 236 F.3d at 1229; *accord Coleman v. Mitchell*, 268 F.3d at 447; *see also Strickland*, 466 U.S. at 691 (counsel has a duty "to consult with the defendant on important decisions . . . in the course of the prosecution").

The Fourth Circuit held that the Maryland Court of Appeals applied *Strickland* reasonably because *Strickland* requires relief only for a "particularly glaring failure of counsel's duty to investigate," and a strategy of "avoid[ing] conflicting arguments *supported limited investigation* into social history." Pet. App. 19a, 23a (emphasis added). But even if defense counsel could reasonably have concluded that potential sentencing strategies were "conflicting" and that only one should be presented (and here counsel neither did so nor reasonably could have done so, *see infra* pages 37-45), they could not have made an informed decision between options without first investigating them thoroughly and knowing their respective strengths.

Counsel's failure to conduct the "requisite diligent investigation" was particularly egregious because doing so was standard practice in Maryland at the time of Wiggins' trial, and Wiggins' lawyers knew that their colleagues routinely did so.[8] JA 487-88. Moreover, this Court's decisions had spoken clearly about the centrality of mitigation evidence in capital sentencing proceedings. *See, e.g., Penry v. Lynaugh*, 492 U.S. at 319; *see also supra* pages 21-23.

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[8] Gerald Fisher, an expert for the defense in Wiggins' state habeas proceedings, testified that in Maryland during the mid-1980s, there were numerous educational conferences for capital defense lawyers – which Schlaich admitted attending. At these conferences, counsel were repeatedly and unambiguously told "that they needed to do the psycho-social history and to work it up." JA 568-69. This uncontradicted testimony made clear that "it was a normative standard at the time this case came in. Indeed, years beforehand." *Id.*

Nothing constrained Wiggins' lawyers from developing such evidence. Schlaich testified that he knew that funds were available to hire an expert to prepare the kind of social history that was presented at the postconviction proceedings. JA 486-87, 489-90. *See Delaware v. Wright*, 653 A.2d at 298 n.10 ("the failure to investigate [defendant's] mental and emotional history cannot be excused based upon financial constraints" because the court approved funds to pay experts). Moreover, Wiggins' lawyers had ten months before the guilt/innocence trial to develop mitigation evidence, and received an additional two-month continuance after the conviction for the express purpose of developing such evidence. *Cf. Hall v. Washington*, 106 F.3d 742, 746 (7th Cir. 1997) (finding ineffective assistance where "[s]ix weeks elapsed between the conviction and the sentencing hearing" and the defendant's lawyers "did practically nothing to advance his case"). Practical realities thus did not require counsel to limit one line of investigation in favor of others they judged more potentially fruitful.

The record also reveals one obvious explanation for the failure to investigate: Each of Wiggins' lawyers believed the other was responsible for developing the case in mitigation. Nethercott testified that Schlaich had that responsibility. JA 540. Schlaich testified that Nethercott had that responsibility. JA 485. Where "[e]ach lawyer testified that he believed that the other was responsible for preparing the penalty phase," the failure to investigate must have "resulted not from an informed judgment, but from neglect." *Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir. 1989); *see also Bean v. Calderon*, 163 F.3d 1073, 1079 (9th Cir. 1998) (same); *Turpin v. Christenson*, 497 S.E.2d at 228 (same).

Nor can the decision of the Maryland Court of Appeals be defended as objectively reasonable on the ground that Wiggins' lawyers had – by virtue of obtaining the social services records

– done enough to permit a reasonable tactical decision. Nethercott did not testify as to any knowledge of mitigation evidence, and Schlaich testified that he knew only what was in "other people's reports." JA 490-91. The state postconviction trial judge who heard that testimony, and reviewed the relevant evidence, specifically found that there was no "mention of abuse against Wiggins in" the social services records, Pet. App. 142a n.269, and that Wiggins' counsel did not know of the powerful mitigation evidence contained in the social history submitted during postconviction proceedings, JA 606.

As federal and state courts applying *Strickland* have consistently held in comparable circumstances, counsel's knowledge of the rudimentary facts contained in Wiggins' social services records does not *discharge* the duty to investigate, but *triggers* it. *See, e.g.*, *Lockett v. Anderson*, 230 F.3d 695, 714 (5th Cir. 2000) (finding ineffectiveness where "there was enough information before counsel . . . to put him on notice" that he should have pursued further investigation); *Jackson v. Herring*, 42 F.3d at 1367 (counsel had "a small amount of information" that necessitated further inquiry); *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir. 1991) (counsel ineffective when "his belief that mitigating evidence was too old and insubstantial resulted from his failure to follow available leads to more recent and persuasive mitigating evidence"); *Caro v. Woodford*, 280 F.3d 1247, 1255 (9th Cir. 2002) (counsel ineffective when he was aware of defendant's "extraordinary history of exposure to pesticides and toxic chemicals, yet he neither investigated fully this history nor informed the experts who examined [the defendant] of those facts"); *Illinois v. Morgan*, 719 N.E.2d at 705 (finding ineffectiveness when, "despite being aware of defendant's mental condition and brain damage, defense counsel failed to conduct an investigation into this relevant potential mitigation evidence"); *Pennsylvania v. Smith*, 675 A.2d at 1233-34

(ineffective assistance when "record reflect[ed that defendant] suffered some mental problems," yet counsel "neither pursued nor presented any evidence of mental state at the penalty phase"); *Goad v. Tennessee*, 938 S.W.2d at 370 (holding that counsel were ineffective for "fail[ing] to adequately investigate and explore mitigating evidence" when "[c]ounsel were aware that the evidence existed prior to trial").[9] Counsel's knowledge of the truncated life history presented in the social services records simply does not excuse counsel's failure to investigate. To the extent the Maryland courts relied on that theory, their decision was both contrary to, and an unreasonable application of, *Strickland*.

In this regard, the Maryland Court of Appeals committed – and the Fourth Circuit repeated – a grievous factual error in suggesting that the social services records revealed to Wiggins' lawyers the squalor and abuse to which Wiggins was subjected as a child. *See* Pet. App. 121a; *id.* 20a. The social services records have been lodged with the Court, and they speak for themselves. The plain fact is that they *do not contain* what the Maryland Court of Appeals and the Fourth Circuit claimed they did. The express findings of the state postconviction court – which neither the Maryland Court of Appeals nor the Fourth Circuit mentioned – make that explicit. *Id.* 142a n.269; JA 604-06; *see also* Pet. App. 54a n.16 ("[T]he Maryland Court of

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[9] *See also State ex rel. Busby v. Butler*, 538 So. 2d at 169 (vacating death sentence when "trial counsel conducted no investigation of mitigating evidence, despite having been told by [defendant] that he had been in numerous institutions"); *Hall v. Washington*, 106 F.3d at 749-50 (evidence "that the defendant has some mental or other condition that would likely qualify as a mitigating factor" necessitates investigation); *Hill v. Lockhart*, 28 F.3d at 845 (finding deficient performance where defendant had told counsel of hospitalizations for mental illness but counsel did not pursue information); *Jermyn v. Horn*, 266 F.3d at 306 (counsel ineffective for failing to investigate the circumstances of defendant's childhood when counsel knew defendant had claimed to have been abused as a child).

Appeals made the erroneous assumption that much of the critical information uncovered by the social history commissioned by post-conviction counsel had been contained in social service records available to trial counsel."). They make no mention of the miserable circumstances in which Wiggins spent the first six years of his life. They contain nothing about his being abandoned by his mother for days on end and forced to beg for food, nothing about the sexual abuse of his sister he witnessed, and nothing about the incident in which his mother forced his hands upon a hot stove, necessitating his hospitalization. Nor do the records contain any evidence of the sustained sexual predation to which he was subjected for years by his principal foster father, or the other instances of rape and abuse in other settings. Other than documenting the mitigating fact of Wiggins' borderline intelligence, the social services records barely scratch the surface of Wiggins' life history.[10] Thus, to the extent the Maryland Court of Appeals' ruling rests on this factual point, it is "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," and cannot be upheld under the applicable standard of review. *See* 28 U.S.C. § 2254(d)(2), (e)(1).[11]

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[10] The State is well aware that the social services records do not contain the vast majority of Wiggins' relevant life history. At the postconviction hearing, counsel for the State sought to impeach the expert who prepared Wiggins' social history by pointing out that the social services records do not document the facts contained in the social history. JA 452.

[11] *Bell v. Cone*, 122 S. Ct. 1843, 1852 (2002), does not require a different result. In *Bell*, counsel had presented extensive testimony about Bell's past at the guilt phase, including testimony about the personality change Bell underwent after serving in Vietnam and his drug dependency. Counsel chose not to repeat this evidence at the sentencing phase because the jury had been instructed to consider evidence from both the guilt and punishment phases in making its determination as to whether a death sentence was warranted. *Id.* at 1848, 1853-54. In stark contrast, the jury

2. *Any "Tactical" Decision to Retry Guilt to the Exclusion of Developing and Presenting Mitigation Evidence Was Itself Ineffective Assistance of Counsel.*

Even apart from failing to develop the powerful mitigation case that was available, the performance of Wiggins' lawyers fell woefully short of "prevailing professional norms." *Strickland*, 466 U.S. at 688. The purported ground upon which the Maryland courts sought to justify counsel's performance was that they had made a reasonable tactical decision to "retry guilt" to the exclusion of a case in mitigation. The State elicited testimony from Schlaich, for example, that he thought it best to avoid a "shotgun" approach that might "confuse[] issues," Pet. App. 23a. As Judge Motz correctly determined, however, if counsel had possessed the mitigating information and had made the "tactical" choice not to present it, that decision would have been "virtually inexplicable." Pet. App. 55a. Indeed, upholding the Maryland Court of Appeals on this ground would be an objectively unreasonable application of *Strickland* for at least three reasons.

First, the realities of Maryland's capital sentencing procedure made it entirely unreasonable for Wiggins' lawyers to forgo developing a mitigation case. Applicable Maryland law provided that "[i]n any case in which the death penalty . . . is requested . . . a presentence investigation . . . shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate

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that sentenced Wiggins never heard his compelling mitigation evidence. Moreover, counsel in *Bell* was aware of the other mitigation evidence, and thus could make a tactical choice about how best to use it. Wiggins' counsel, in contrast, had failed to conduct the requisite diligent investigation that would have allowed them to make a reasoned tactical decision regarding the presentation of mitigation evidence.

sentencing proceeding is conducted." Md. Ann. Code art. 41, § 4-609(d) (1988). Wiggins' July 1989 presentence report contained a brief description of his personal history and mental health status. His lawyers thus knew well in advance of sentencing that the jury would consider Wiggins' background and character no matter what they did, and that a focus on "retrying guilt" would result in Wiggins' life history being assessed solely on the basis of the presentence report.

A review of the presentence report vividly illustrates just how ineffective Wiggins' lawyers were in this regard. The report omits *all* of the powerful mitigation evidence contained in the social history submitted during the postconviction proceedings. The report also ignores even the mitigating aspects of Wiggins' character contained in records Wiggins' lawyers did possess (such as Wiggins' possible mental retardation). Even worse, Wiggins' childhood is painted in a highly unsympathetic light – the report quotes Wiggins as saying his childhood was "disgusting but he believes, somehow he will get it together" (JA 20) – and uses quotes from the presentence investigator's interview with one of Wiggins' sisters to cast doubt on even that vague and unhelpful description. JA 21 (quoting description by Wiggins' half-sister of the home where the sexual abuse occurred as "a nice home with a roof over our heads"). Had they been armed with the facts contained in Wiggins' social history, counsel could have countered the grossly misleading portrayal in the presentence report with the truth about his extreme suffering and deprivation. They could have educated the jury about the squalor of his natural mother's home and her cruelty towards him, and about the rampant sexual abuse he suffered at the hands of those the State chose to care for him.

It is not "the distorting effect[] of hindsight" to perceive this as a profound failure. *Strickland*, 466 U.S. at 689.

"[R]econstruct[ing] the circumstances of counsel's challenged conduct, and evaluat[ing] the conduct from counsel's perspective at the time," *id.*, Wiggins' lawyers had no basis for failing to develop mitigation evidence. Wiggins' lawyers knew at the time that the jury would be instructed to weigh aggravating evidence against mitigation evidence. They also knew that the jury would have the presentence report to consider as mitigation evidence. Keeping Wiggins' background out of the picture was simply not an option. Yet they did not even try to discover whether the facts of Wiggins' life history might be different – and more compellingly mitigating – than the version contained in the presentence report. As in *Williams v. Taylor*, "[t]he consequence of counsel's failure to conduct the requisite, diligent investigation into their client's troubling background and unique personal circumstances" was that the jury received a truncated and highly misleading version of Wiggins' life history. 529 U.S. at 415 (O'Connor, J., concurring).

Second, Wiggins' lawyers did not focus exclusively on "retrying guilt," and their conduct thus cannot be retroactively justified on that basis. The transcript of the sentencing hearing unambiguously establishes that Wiggins' lawyers did not focus exclusively on retrying guilt. To the contrary, counsel's opening statement told the jury that "you as sentencers consider not only the facts of the crime, what a person is found to have done, but also you must consider who that person is." JA 70. After summarizing the case against guilt, counsel promised the jurors that they were

> going to hear that Kevin Wiggins has had a difficult life. It has not been easy for him. But he's worked. He's tried to be a productive citizen. . . . I think that's an important thing for you to consider.

Id. 72.

But, after inviting the jury to consider "who [Wiggins] is," and without any suggestion that unforseen events caused counsel to reverse course, his lawyers offered literally *nothing* about Wiggins' "difficult life" that would serve to lessen his culpability. *See, e.g.*, *Ouber v. Guarino*, 293 F.3d 19, 27 (1st Cir. 2002) (where unforeseeable events did not require change in strategy, defense counsel's failure to follow through on promises in opening statement constituted ineffective assistance); *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166 (3d Cir. 1993) ("The failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffectiveness of counsel.").

Rather than present such evidence, Wiggins' lawyers offered "mitigation" evidence that was a poor substitute for Wiggins' compelling life history. The final defense witness was a criminology expert, Dr. Robert Johnson, who testified about violent offenders' prospects for successful adjustment to prison life. Dr. Johnson opined generally that prisoners serving life sentences for violent offenses tend to commit fewer infractions while incarcerated than do prisoners with shorter sentences. He testified that such prisoners are generally more successful at controlling violent impulses in a prison setting than they would be outside of prison. JA 311-13. He then testified that he had interviewed Wiggins, and believed Wiggins would "fit the generalization" because "he showed some of the patterns of settling into jail life." *Id.* 319-20. He reached this conclusion despite acknowledging (in testimony elicited by Schlaich) that Wiggins had several infractions while incarcerated, and had made "verbal threats." JA 318.[12]

[12] Dr. Johnson's testimony had no relevance to issues of Wiggins' guilt or principalship. It was relevant only to the ultimate weighing judgment the jury would make *after* concluding that Wiggins was a principal. Johnson's testimony assumed that Wiggins was a violent person whose aggressive tendencies could be controlled in a prison environment, and its sole purpose was to provide a reason to spare Wiggins on the assumption that he had killed Ms. Lacs.

Wiggins' lawyers thus managed to bring about the worst of all worlds. Schlaich's abortive presentation of mitigation evidence was precisely the sort of "shotgun approach" he testified he intended to avoid, yet he did not present the powerful mitigation case that was available. The reality is that Wiggins' lawyers lacked any reason – strategic or otherwise – for failing to develop and present the available powerful mitigation case. Whatever counsel subsequently claimed, what they actually did at sentencing was plainly unreasonable.

Third, Wiggins' lawyers acted unreasonably in concluding that mitigation evidence would be inconsistent with an effort to disprove principalship. As Judge Niemeyer stated, Wiggins' counsel "could have had it both ways. He could have insisted on arguing liability and still have maintained that any sentence of death would be inconsistent with the mitigating circumstances of Wiggins' miserable upbringing and marginal intelligence." Pet. App. 25a. Far from conflicting with an effort to disprove principalship, as the district court observed, these facts could have been "mesh[ed]... into an effective argument that Wiggins had been made the pawn of others who were responsible for the murder." *Id.* 55a n.17. Wiggins' marginal intelligence made him particularly susceptible to being manipulated by others. *See generally Atkins v. Virginia*, 122 S. Ct. 2242, 2250 (2002) ("[T]here is abundant evidence that . . . in group settings [mentally retarded persons] are followers rather than leaders."). Wiggins' social history similarly shows that he willingly concealed the sexual abuse inflicted by his foster father and Jobs Corps supervisor in order to maintain some semblance of

familial relationships in his life. Counsel could have argued a similar pattern here to suggest that Wiggins was merely covering for the Armstrongs.

Nor was there any danger that introducing mitigation evidence would have opened the door to evidence of prior convictions, violence, or suggestions of future dangerousness. Wiggins had no prior criminal record. *See* Pet. App. 55a ("The absence of a criminal record presumably would have dispelled any fear that counsel would have had that presentation of evidence about Wiggins's background would have been detrimental to him in terms of 'future dangerousness.'"). Indeed, given the lack of prior history of violence, the Fourth Circuit's contrary suggestion that mitigation evidence could have harmed Wiggins, *id.* 22a-23a, flouts *Williams* and renders meaningless this Court's repeated holdings that the Constitution requires that the jury receive information necessary for it to render a "reasoned moral response." If the mitigation evidence available in this case is "double-edged," then no defendant could ever successfully pursue an ineffectiveness claim for failure to present mitigation evidence.

Moreover, the course counsel actually pursued was so ill-conceived as to be ineffective under any circumstances. Wiggins' lawyers knew before the sentencing proceeding commenced that the jurors would be instructed that

> Kevin Wiggins has been convicted of murder in the first degree of Florence Lacs and the robbery of Florence Lacs. This conviction is binding upon you. Even if you believe the conviction to have been in error, you must accept that fact.

JA 362; *see also* JA 492. In light of that unambiguous instruction, Wiggins' lawyers had no prospect of convincing the

jury that Wiggins was innocent of all involvement in Ms. Lacs' murder. Their only option was to contest "principalship."

To establish principalship in Maryland, and thus establish the defendant's eligibility for the death penalty, the prosecution must show the defendant is "the one who *actually* commit[ted] the crime, either by his own hand, or by an inanimate agency, or by an innocent human agent." *Pope v. Maryland*, 396 A.2d 1054, 1064-65 (Md. 1979) (emphasis added). Principalship is thus not about the defendant's innocence, but rather the degree of his personal moral culpability. *See generally Enmund v. Florida*, 458 U.S. 782 (1982). Accordingly, the defense available to Wiggins' lawyers was to acknowledge what the trial court's instructions made mandatory – that Wiggins was involved – but to contend that someone else was principally responsible for Ms. Lacs' death.[13] In other words, counsel needed to present an alternative hypothesis as to who might have been the principal.

Wiggins' counsel never made such an argument, even though (as the district court noted) it was readily available to them. Pet. App. 44a n.9. The trial record showed that Wiggins' girlfriend, Geraldine Armstrong, was with Wiggins when he was arrested in Ms. Lacs' car, and had been the one actually using the credit cards to make purchases on the evening of September 15th. Indeed, the prosecution depended on her self-serving testimony to establish that Wiggins arrived at her

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[13] The judge instructed the jury:

> [Y]our first task, as I said, is to determine in Section I of this form whether you are unanimously persuaded beyond a reasonable doubt that the defendant was a principal in the first degree to the murder of Florence Lacs. The defendant's conviction of first degree murder does not establish that he was a principal in the first degree. A principal in the first degree is one who actually committed the murder by his own hands.

JA 362-63.

home on the 15th in possession of Ms. Lacs' car and credit cards. Armstrong was originally arrested with Wiggins and charged with murder and robbery, but all charges against her were later dropped.[14] One of Armstrong's brothers lived directly below Ms. Lacs in the apartment complex. Another of Armstrong's brothers became involved in a violent argument with Wiggins at Armstrong's home at precisely the time she later contended Wiggins arrived with Ms. Lacs' car and credit cards on the evening of September 15th. These facts could well have supported an argument that one or more of the Armstrongs were principally responsible for the murder. But Wiggins' lawyers made no such argument. To the contrary, as the Maryland Court of Appeals noted, Wiggins' lawyers advanced no evidence or argument showing that someone else was principally responsible for the murder. *Wiggins v. Maryland*, 597 A.2d 1359, 1368 (Md. 1991).

Instead of offering a coherent factual narrative supporting the conclusion that Wiggins was merely an accomplice, Wiggins' counsel urged the jurors to reach the "stunning conclusion . . . that you can't be sure beyond a reasonable doubt that Kevin Wiggins *had any role at all* in the murder of Ms. Lacs," JA 391 (emphasis added). That was – and could only have been understood by the jury as – a plea for nullification. But "[a] jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *see also Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974). In contrast, "arguments of counsel generally carry less weight with a jury than do instructions from a court. The former are usually billed in advance to the jury as

[14] Although the trial record did not include this fact, Armstrong failed a state-administered polygraph examination, which indicated that she answered falsely when asked whether she had been in the victim's apartment and had participated in the murder. Mar. 29, 1994 Tr. at 103. Wiggins' lawyers possessed the polygraph report at the time of the sentencing hearing.

matters of argument, not evidence, . . . and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law." *Boyde v. California*, 494 U.S. 370, 384 (1990). The instruction here was particularly likely to command the jury's obedience, because it involved not an arcane point of law but a fundamental fact: Wiggins had already been convicted of the murder beyond a reasonable doubt. Counsel's effort to have the jury disregard those instructions cannot be defended as a reasonable strategy. *Cf. Strickland*, 466 U.S. at 694-95 (applying "assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision"). That is particularly true given that the judge, not the jury, found guilt, and Wiggins' lawyers therefore could not play on any "lingering doubt" on the part of the sentencers.

Thus, for all these reasons, it was an unreasonable application of *Strickland* for the Maryland courts to conclude that Wiggins received the effective assistance of counsel to which the Sixth Amendment entitled him.

II. WIGGINS WAS PREJUDICED BY HIS COUNSEL'S PERFORMANCE.

In the Fourth Circuit, the State barely contested prejudice, and with good reason. Chief Judge Motz held – and the Fourth Circuit did not dispute – that because "Wiggins' mitigation evidence was much stronger, and the State's evidence favoring imposition of the death penalty was far weaker, than the comparable evidence in *Williams*," the conclusion that Wiggins was prejudiced by his counsel's deficient performance follows from *Williams* "*a fortiori*." Pet. App. 52a.

In *Williams*, this Court applied *Strickland*'s standard for assessing prejudice – petitioner must prove that there is a

"reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694 – and held that the Virginia Supreme Court had unreasonably concluded that Williams suffered no prejudice from his counsel's failure to prepare and present a case in mitigation. *Williams*, 529 U.S. at 391, 396-97.

Trial counsel in *Williams* had failed to discover and present to the jury important mitigating evidence, including that "Williams' parents had been imprisoned for criminal neglect of Williams and his siblings, that Williams had been severely beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration . . . and then, after his parents had been released from prison, had been returned to his parents' custody." 529 U.S. at 395 (footnote omitted). Counsel had also failed to introduce evidence that Williams was "borderline mentally retarded," and had failed to discover prison records that contained "commendations" Williams had received in prison, as well as positive testimony from a member of a prison ministry program.

Although the mitigation evidence left undiscovered in *Williams* was substantial, so too was the prosecution's evidence supporting the death sentence. In particular, Williams, prior to the murder for which he had been sentenced to death, "savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw." 529 U.S. at 418 (Rehnquist, C.J., dissenting) (internal quotation marks and citation omitted). Moreover, even the evidence trial counsel had failed to discover was not uniformly helpful, because it included Williams' substantial juvenile criminal record. *See* 529 U.S. at 396.

Yet despite Williams' acknowledged history of serious criminal violence, and despite the fact that some of the evidence omitted by counsel would have been damaging to Williams, this Court held that the mitigation evidence counsel had failed to investigate, discover, and present to the jury "might well have influenced the jury's appraisal of his moral culpability," *id.* at 398 (quoting *Boyde v. California*, 494 U.S. at 387). Accordingly, this Court held that counsel's deficient performance had prejudiced Williams.

The conclusion that Wiggins was prejudiced by his counsel's failures at the sentencing stage follows inevitably from *Williams*. The mitigation evidence that competent trial counsel would have discovered was even more compelling than the evidence left undiscovered in *Williams*. The jury that sentenced Wiggins to death never learned that Wiggins and his siblings were routinely left alone and unfed for days at a time; that Wiggins witnessed one of his sisters routinely being sexually abused by a boyfriend of his mother; that Wiggins was physically abused by his first foster family and, from the age of eight on, was sexually abused for many years by his second foster father; that Wiggins was raped by the teenaged sons of his fourth foster family; and that Wiggins was molested by his Job Corps supervisor. Pet. App. 54a-55a (internal citations omitted); *see supra* pages 8-9.

Nor did the jury know (as the social services records indicated) that "Wiggins possessed 'borderline intelligence' and in fact may have been mentally retarded." Pet. App. 53a n.15. The failure to introduce that evidence was particularly harmful because this Court had just held that mental retardation was a mitigator to be considered in capital cases, *see Penry v. Lynaugh*, 492 U.S. 302, and, just weeks before Wiggins went to trial, the Maryland legislature passed a statute forbidding the execution of the mentally retarded, Pet. App. 53a n.15.

In short, like Williams, Wiggins suffered severe physical abuse as a child and was at least borderline mentally retarded. But Wiggins' witnessing of the routine sexual abuse of his sister and the repeated sexual abuse and rape to which Wiggins himself was subjected in his foster homes left Wiggins' childhood marked by a degree of suffering beyond even that which characterized Williams' "nightmarish childhood." Had Wiggins' trial counsel been competent, they would have had available mitigation evidence that was far more compelling than that available to counsel in *Williams*.

Moreover, the prosecution's case in aggravation was indisputably weaker than in *Williams*. In *Williams*, the State demonstrated that Williams "had engaged in a life-long crime spree," and it presented "strong evidence that [Williams] would continue to be a danger to society, both in and out of prison." *Williams*, 529 U.S. at 419 (Rehnquist, C.J., dissenting). In stark contrast, in Wiggins' sentencing hearing, the prosecution introduced *no* evidence (apart from the underlying facts of the crime) to support the death sentence in Wiggins' case. The sole aggravator the State sought to prove was that the murder was committed in the course of a robbery.

In further contrast to *Williams*, Wiggins had no previous convictions or other history of violence that would have become available to the prosecution. The State stipulated accurately that Wiggins had no convictions for crimes of violence; indeed, Wiggins had no prior convictions at all. There was thus substantially less concern for Wiggins than there was for Williams that the new evidence might reinforce the State's argument that the defendant should be put to death.

Finally, the prejudice to Wiggins is even more stark because the available mitigation evidence would have dramatically reinforced the principalship defense that counsel purported to mount. Counsel would have been able to

incorporate the mitigation evidence regarding Wiggins' vulnerability and possible mental retardation into "an effective argument that Wiggins had been made a pawn of others who were responsible for the murder," Pet. App. 55a n.17, making it less likely that Wiggins was the "principal."

The consequence of counsel's failure to present either Wiggins' compelling family and social history or the ample evidence of his diminished capacity cannot be overstated. Under Maryland law, if only one juror believes that mitigating evidence outweighs aggravating evidence, the death penalty cannot be imposed. *See, e.g., Borchardt v. Maryland*, 786 A.2d 631, 660 (Md. 2001). Moreover, it is well-established that jurors need not agree unanimously on particular mitigation evidence to give it effect. *See Mills v. Maryland*, 486 U.S. at 400; *McKoy v. North Carolina*, 494 U.S. 433, 443 (1990). In light of the powerful mitigation evidence that the jury never heard and the weakness of the prosecution's aggravation case, there is at a bare minimum a "reasonable probability" that at least one of the twelve jurors would have concluded that the mitigation evidence outweighed the slight aggravating evidence, and that a punishment of death was impermissible.[15] Indeed, the jury's knowledge of Wiggins' horrific childhood and marginal intelligence would likely have made a difference to all the jurors faced with the decision on Wiggins' sentence.

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[15] Both before and after *Williams*, the courts of appeals have routinely found prejudice in cases involving inadequate mitigation investigations even when the mitigating evidence was less compelling and the aggravating evidence more compelling than the evidence at issue here. *See, e.g., Lockett v. Anderson*, 230 F.3d at 713-16; *Brownlee v. Haley*, 306 F.3d 1043, 1070 (11th Cir. 2002); *Collier v. Turpin*, 177 F.3d 1184, 1202-03 (11th Cir. 1999); *Battenfield v. Gibson*, 236 F.3d at 1235; *Emerson v. Gramley*, 91 F.3d at 906-07; *Jermyn v. Horn*, 266 F.3d at 309-12; *Carter v. Bell*, 218 F.3d 581, 599-600 (6th Cir. 2000); *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995)

In short, even more so than in *Williams*, an analysis of "the totality of the omitted mitigation evidence," including Wiggins' upbringing and limited mental capacity, "might well have influenced the jury's appraisal of his moral culpability." 529 U.S. at 398. Accordingly, Wiggins' death sentence must be vacated.[16]

CONCLUSION

The decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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[16] This Court's decision in *Woodford v. Visciotti*, 123 S. Ct. 357 (2002) (per curiam), is not to the contrary. First, the mitigating evidence at issue there – that Visciotti had been "berated" as a child; he lacked "self-esteem"; he had feelings of "inadequacy, incompetence, inferiority"; and he had "moved '20 times' while growing up," *id.* at 361 – is of a different order of magnitude than the evidence here. Second, the aggravating evidence at issue in *Visciotti* was substantially more egregious, and included prior violent offenses, such as "the knifing of one man and the stabbing of a pregnant woman as she lay in bed trying to protect her unborn baby." *Id.*

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